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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 829

GENEVER LEWIS, *et al.*,

Appellants,

vs.

ROBERT MARTIN, Director of the State Department of Social Welfare of the State of California, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

Opinions Below

The memorandum opinion [A. 34] of the court below dismissing the complaints and dissolving the three judge court is officially unreported but is printed at ¶ 9299 CCH Pov. L. Rep. The order denying plaintiffs' motion to vacate the memorandum opinion and motion for rehearing [A. 60] is unreported.

Jurisdiction

This is a direct appeal to this Court pursuant to 28 U.S.C. §§ 1253 and 2101(b) from the final decision of the three judge court of the United States District Court for

the Northern District of California, which was convened in compliance with 28 U.S.C. §§ 2281 and 2284.

The court below had jurisdiction pursuant to 28 U.S.C. §§ 1343(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983, to grant the requested injunctive relief and to declare invalid a California statute and certain statewide regulations of the California Department of Social Welfare. The cases (Civ. No. 50238, filed October 31, 1968, and Civ. No. 50285, filed November 12, 1968, with certain plaintiffs intervening as of right under Rule 24(a), Fed. R. Civ. Proc. [A. 35]) were set for consolidated hearing before the three judge panel on November 26, 1968. Pursuant to defendants' motion to dismiss the complaints, the district court in a memorandum opinion filed on December 23, 1968, rendered its judgment for defendants in both cases and dismissed the complaints. On March 12, 1969, the court below denied plaintiffs' timely motion to vacate and motion for rehearing filed January 2, 1969. At the same time the court denied a motion to intervene by the Secretary of Health, Education and Welfare. Plaintiffs filed a joint notice of appeal on May 8, 1969. The jurisdictional statement was filed on July 7, 1969. On November 10, 1969, the Supreme Court granted plaintiffs' motion to proceed *in forma pauperis* and noted probable jurisdiction (38 U.S.L. Wk. 3173 (No. 560 Misc., Nov. 11, 1969)) and the appeal was docketed (38 U.S.L. Wk. 3185 (No. 829, Nov. 18, 1969)) [A. 61].

Questions Presented

Plaintiffs are needy children and their mothers, who receive Aid to Families with Dependent Children welfare assistance. They depend on recurring grants of such wel-

fare aid to meet in a minimal subsistence fashion the basic essentials of life, including food, shelter, clothing and medical care. The mothers reside with men who are either stepfathers to the children or who are deemed to be assuming the role of spouse to the mother under California welfare law. The needy families suffer reduced welfare grants because California assumes that the man in the house contributes his available income to the needy children. The amount so assumed is not, in fact, available or contributed in spite of a purported legal obligation imposed on a man in the house to provide such support. The grant reductions deny needy children sufficient means with which to meet their basic needs and expose them to extreme hardships and privation. Under these circumstances:

(1) Is the regulation (45 C.F.R. § 203.1), which was promulgated by the Secretary of Health, Education and Welfare (HEW) in order to preclude the continued enforcement of state man-in-the-house rules, but which was held invalid by the court below, a reasonable interpretation of § 402(a)(7) of the Social Security Act (42 U.S.C. § 602(a)(7)) and consistent with the purposes of the Act and the intent of Congress, as interpreted by this Court in *King* v. *Smith*, 392 U.S. 309 (1968);[1]

(2) Does the Social Security Act (42 U.S.C. §§ 601 *et seq.*), as interpreted by this Court, together with the regu-

[1] The HEW regulation was in part a reaffirmation of long-standing rules, prohibiting the assumption of income not available in fact, which were expressly approved by this Court in *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968). *See* Argument, Point I-A, *infra*. The same regulation was recently invoked by a three judge district court in striking down Connecticut's man-in-the-house rule, a decision subsequently affirmed by this Court. *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn., 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

lation held invalid below and long-standing regulations promulgated by the Secretary of Health, Education and Welfare, preclude the grant reductions and terminations effected by California's man-in-the-house rules, which operate to deny needy children the basic subsistence guaranteed by federal law;

(3) Does due process prevent California from erecting an irrebuttable presumption that a man residing in the house with needy children is contributing to their support, and from thereby denying such needy children any opportunity to prove that presumed contributions are, in fact, not made and that the presumption to the contrary is without factual basis; and

(4) Does the guarantee of equal protection of law prohibit California from distinguishing between classes of equally needy children by denying, reducing and terminating federal welfare assistance to that class of needy children whose mother has a man in the house, when the classification rests solely on the irrebuttable and demonstrably false presumption that such a man contributes to their support, and when his presence in the home bears no reasonable relationship to the purposes of the AFDC program?

Statutes and Regulations Involved

The rights asserted herein arise under Title IV of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601 *et seq.*, and under regulations promulgated by the Secretary of Health, Education and Welfare (HEW). The relevant sections of the Act, 42 U.S.C. §§ 601 and 602(a)(7), are set forth as Appendix A, *infra*, p. 63. The HEW regulation declared invalid by the court below, 45 C.F.R. § 203.1,

is set forth as Appendix B, *infra*, pp. 64-65. The following regulations from Part IV of the HEW *Handbook of Public Assistance Administration* (hereafter HEW *Handbook*) are set forth in Appendix C, *infra*, pp. 66-70: §§ 3120, 3123, 3124, 3131(7), 3131(10), 3131(11).

The state statute drawn in question is California Welfare and Institutions Code (hereafter Calif. W. & I.C.) § 11351; it is set forth in Appendix D, *infra*, p. 71. Statewide administrative regulations of the California Department of Social Welfare are set forth, as they existed at the time the suits were commenced, in Appendix E, *infra*, pp. 72-81. Regulations which have superseded certain provisions originally involved are set forth in Appendix F, *infra*, pp. 82-92. (After this appeal was docketed, new laws became effective which relate to some issues raised herein. The new statute, Calif. W. & I.C. § 11351.5, and proposed implementing regulations are set forth in Appendix G, *infra*, pp. 93-99. Discussion of the significance of the new laws is set forth in Appendix H, *infra*, pp. 100-104.)

Statement

Appellants are needy children who are applicants for, or recipients of, financial assistance under the Aid to Families with Dependent Children (AFDC) provisions of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*[2] Such AFDC grants are paid to meet the needs of dependent children who lack the income and resources necessary to secure a

[2] Other classes represented by named plaintiffs are needy welfare mothers, stepfathers married to welfare mothers but whose natural children are not eligible for welfare, and men who are determined to be assuming the role of spouse to welfare mothers.

basic subsistence. 42 U.S.C. §§ 602(a)(7) and 606(a). For a given needy family the California welfare department determines the cost of basic needs, such as food, shelter, clothing and medical care, according to set schedules.[4] From the need figure for an eligible family are deducted recurring income that is actually received, such as child support payments. The balance of needs not met by the

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[4] *See* Calif. W. & I.C. §§ 11450 *et seq.*

The welfare need standards established by the California welfare department have been held to be inadequate as a matter of law. ***Ivy v. Montgomery***, Civ. No. 592705 (San Fran. Co. Super. Ct., Calif., Sept. 11, 1969). The Findings of Fact include:

> 21. In establishing housing allowances, the SDSW [State Welfare Department] does not obtain any information regarding the quality or condition of housing and does not determine whether the housing upon which the samples are based meet the requirements of local and State housing codes.
>
> • • •
>
> 23. The gap between the AFDC allowance for rent, and the minimum rents actually paid for safe, healthful housing, can only be met out of the subsistence amounts allowed for other living necessities such as food and clothing. For every rent dollar paid above the AFDC allowance, the recipient has one dollar less than she needs for the other needs of her family.
>
> 24. Defendants Montgomery and the SDSW, in adopting the Cost Schedules, do not establish housing allowances in accordance with the local cost for housing as determined by the samples obtained from the counties.
>
> • • •
>
> 45. The application of the 1967, 1968 and 1969 Cost Schedules in determining AFDC recipients' grants has resulted in irreparable injury, including malnutrition and ascertainable monetary loss among AFDC families.

The Court entered, *inter alia*, the following Conclusion of Law:

> 8. The AFDC Cost Schedules in California for the years 1967, 1968 and 1969, were adopted in violation of California Welfare and Institutions Code, Section 11452, in that the Cost Schedule housing allowances did not reflect the minimum amount necessary for AFDC recipients to obtain safe, healthful housing.

family's income will usually be the amount of the AFDC grant.[4]

California's welfare laws additionally require in the need determination process the consideration of the available income of a stepfather to the needy children, or of a man assuming the role of spouse (MARS) to their mother.[5]

---

[4] However, when the family's needs exceed maximum grant levels established by Calif. W. & I.C. § 11450(a), aid will be granted only to the maximum ceiling. If eligible for AFDC benefits at the time the suits were filed, a mother and her four year old daughter, like plaintiffs Percy, would have received only $148 per month although they had no income and their needs under State welfare standards would have been $192. A three judge district court recently held invalid the California maximum grant statute. *Kaiser* v. *Montgomery*, Civ. No. 49613 (N.D. Cal., Aug. 28, 1969), ¶ 10391 CCH Pov. L. Rep., *juris. statement filed*, 38 U.S.L. Wk. 3185 (No. 828, Nov. 10, 1969). *See also Williams* v. *Dandridge*, 297 F.Supp. 450 (D. Md., 1968), *prob. juris. noted*, 38 U.S.L. Wk. 3127 (No. 131, Oct. 14, 1969) (legality of Maryland maximum grant scheme argued and submitted for decision on Dec. 9, 1969).

[5] At the time this action was commenced, Calif. W. & I.C. § 11351 imposed an apparent duty to support needy children on both a stepfather and a man assuming the role of spouse (MARS) to the children's mother. *See* Appendix D. (The statewide interpretive regulations are set forth in Appendices E and F.) Such a duty existed only in AFDC households; Calif. Civ. C. § 209 precludes a similar obligation in a nonwelfare situation.

Although § 11351 originally imposed such a duty on only the AFDC stepfather, the legislature added the MARS language to give express statutory authority to California's man-in-the-house rules following the sharp dissent of Justice Peters in *People* v. *Shirley*, 55 Cal.2d 521, 526, 360 P.2d 33, 36, 11 Cal. Rptr. 537, 540 (1961). *See* Report of the Senate Fact Finding Committee on Labor and Welfare, *Aid to Needy Children Program*, App. to J. of Sen. of Calif. (1961), v. 2, p. 66.

Both the wording of § 11351 and the opinions of the Justices of the California Supreme Court seem clearly to impose a support duty of some kind on a stepfather or MARS. While lower California courts have equivocated about the existence of any legal duty under § 11351 (*see, e.g., People* v. *Owens*, 231 Cal. App.2d 691, 697, 42 Cal. Rptr. 153, 157 (1965); *County of Kern* v. *Coley*,

The method for computing the amount of income available from a man in the house recognizes that the man has some obligations and personal needs that must be met. Those deductions which are permitted are, however, arbitrarily limited [A. 38-39] without regard to actual additional expenses of the man in the house. Moreover, the man's personal living needs are calculated at a welfare standard of existence* [A. 37 n. 3]. The operative result of the man-in-the-house budgetary rules is that the amount of income *actually* available from a man in the house is much less than the amount deemed available by the welfare department. Nevertheless, the rules conclusively presume that the needs of the children are reduced by the amount of

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229 Cal. App.2d 172, 177, 40 Cal. Rptr. 53, 56 (1964)), defendants claimed, and the court below held, that there was such a duty and that it was—for purposes of the instant case—equivalent in either a stepfather or MARS situation [A. 35, 45]. Plaintiffs assume arguendo that there is such a duty. The essential inquiry, however, is not whether a support duty exists but how the law affects needy children. The alleged support duty has been of little significance to such children because it has virtually never been enforced in the courts. *See* n. 39, *infra*, p. 33.

Effective November 10, 1969, the MARS language is deleted from § 11351, and a new statute (§ 11351.5) added. *See* Appendix G. The significance of the new statute is discussed in Appendix H.

* The determination of "available income" is particularly unreasonable in light of the fact that the man is assumed to meet his living costs at the wholly inadequate level of welfare budgets. *See* n. 3, *supra*. For example, a review of California standards concluded:

> The basis on which the Department has established housing allowances is unrelated to any evaluation of adequacy or decency, even in the most rudimentary term. The allowances are based on obsolete 1958 levels (and less than 100% of these!). Unlike other welfare budget items—food, clothing, drugs, utilities, etc.—rent allowances are not based on market research, or tied to quality standards. They are in effect mere fictions. [California State Social Welfare Board, *First Annual Report* (1965), at p. 50.]

income deemed available from the man in the house, regardless of whether such income is, in fact, available or actually used to meet the needs of the dependent children. The rules reduce and deny welfare grants of needy children in spite of actual need. Approximately 2800 AFDC families presently suffer grant reductions because of the conclusive presumption erected by California's man-in-the-house rules.[7] Plaintiffs, who present stepfather or MARS situations, are illustrative examples.[8]

Mrs. Lewis and her needy son and daughter were advised in October, 1968, by the defendant Alameda County Welfare Department (ACWD) that their welfare budget was about to be cut. Mrs. Lewis is divorced and her husband does not pay child support (even though he is under court order to do so). She had been receiving $175.00 per month from defendant ACWD, although the family has needs of $191.00.[9] The defendants advised Mrs. Lewis that her grant was to be reduced by $53.55 per month [A. 7], an amount irrebuttably presumed available to the family from Mr. Frank Watson, a man unrelated to the children, who had an informal relationship with Mrs. Lewis. Mr. Watson's take-home pay was $95.00 per week from his job as a maintenance man, and he was deeply in debt for cash loans and installment credit purchases incurred both before and after he met Mrs. Lewis. In fact, Mr. Watson did not

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[7] Lewis Record [hereinafter L.R.] 127. No data are available to reveal the number of families rendered wholly ineligible by the rules in question.

[8] Because plaintiffs' verified complaints were dismissed by the court below "for failure to state a claim upon which relief can be granted" [A. 49], the facts alleged therein must be taken as true for purposes of this appeal. Fed. R. Civ. Proc., Rule 8(d).

[9] *See* n. 4, *supra*, p. 7.

regularly make available to the Lewis children any part of his income, and Mrs. Lewis offered to prove this to the welfare department. The defendants, however, refused to consider any such evidence [A. 8-9].

Margaret Percy has a four year old daughter. Because the child's father had deserted the family, and because Mrs. Percy was unable to secure employment, she sought the assistance of a friend, Mr. Melvin Jones. Mr. Jones, burdened with extensive personal obligations and expenses, took Mrs. Percy and her child into his home, but was financially unable to provide them with more than shelter. Mrs. Percy sought the assistance of her local welfare department. Applying the man-in-the-house budgetary rule, the welfare department denied her assistance on the grounds that, because of Mr. Jones' presence in the household, his income was presumed irrebuttably to be "available" to Mrs. Percy's daughter. Mr. Jones was, in fact, not making his income available to Mrs. Percy or her daughter [A. 18; Percy Record (hereafter P.R.) 13, 49]. The department refused to consider that fact [A. 18].[10]

The circumstances of the plaintiffs who intervened in Civil No. 50285 [A. 35] further illustrate the effects of the budgetary rule upon needy children. In the case of the Bell family, the welfare department applied the rule

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[10] At the present time Margaret Percy and her daughter no longer reside in California. Because the man-in-the-house rules prevented Mrs. Percy from meeting the financial needs of her child, she became emotionally distraught and attempted suicide by slashing her wrists and throat. Following her recovery, she went to live with her parents out of the state and does not currently seek AFDC benefits in California. However, her claim for benefits wrongfully denied her during the period she resided in California remains to be resolved. *See Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969). And, of course, the change in her status does not affect that of the other named plaintiffs or the class she represented.

to assume that Mr. Bell could live on a welfare level of subsistence, thereby making the rest of his income "available" to his five stepchildren. As a result, a hitherto stable marriage broke up because the family was unable to cope with its financial burdens. Mr. and Mrs. Bell separated, leaving Mrs. Bell alone with six children, one of whom was the issue of the marriage. Welfare assistance was then granted for all six children [A. 26-27].

The Sims family was also broken up because of the rule. Mrs. Sims was left with the four stepchildren [P.R. 56]. In the Garner household, only Mrs. Garner's four children received AFDC. The child born to Mrs. Garner and the MARS was ineligible for any benefits because not deprived of parental support. However, when the welfare department calculated how much of the man's income was required to support his natural child, that child was presumed to exist at a welfare subsistence level [P.R. 90].

Because of the effects of California's man-in-the-house laws, plaintiffs instituted class actions pursuant to Rule 23(b), Fed. R. Civ. Proc., for injunctive and declaratory relief on various constitutional and statutory grounds. Their primary contentions were that (1) the California statute and regulations are contrary to the Social Security Act and to regulations promulgated by the Department of Health, Education and Welfare (HEW), in particular 45 C.F.R. § 203.1; (2) the state laws deny due process contrary to the Fifth and Fourteenth Amendments of the United States Constitution because the conclusive presumption they create is not rationally supported; and (3) the state laws contravene the equal protection clause of the Fourteenth Amendment because they classify needy children according to the presence or absence of a rela-

tionship between their mother and a man in the house, a factor not reasonably related to the purposes of the AFDC program.

On October 31, 1968, the district court found that Mrs. Lewis and her children (plaintiffs in Civil No. 50238) were suffering irreparable injury because of the impending grant reduction, and issued an order temporarily restraining it [L.R. 23]. On application for a preliminary injunction on November 12, 1968, the order was dissolved. The case was set for consolidated hearing with Civil No. 50285 before a three judge panel, which rejected the claims of plaintiffs, finding the HEW regulation—rather than the California rule—"inconsistent with the language and policy of the Social Security Act" [A. 49], and granted defendants' motion to dismiss [A. 49].[11] Plaintiffs filed a timely motion

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[11] The court below held:

> [Section 11351] obligates the MARS [and the stepfather] to support the children in the home to the extent he is able to do so and modifies the amount of assistance to the extent of the MARS' ability. In light of this statutory obligation, income to the MARS beyond his expenses is *by law* a resource of the child. For California to ignore this resource would be to violate rather than conform to the Social Security Act. By withholding from California's consideration certain resources of the MARS, available according to the State's determination and applicable by law to the support of the child (although not proved to have been actually thus employed), the HEW regulations contravene the command of § 602(a)(7) to consider "other resources of the child." It is therefore California that is in conformity with the Social Security Act. The HEW regulations, having been issued contrary to the congression [sic] mandate, are, in the view of this court, invalid. [A. 39-40; emphasis in original.]

However, a three judge district court in Connecticut upheld the same regulation under § 602(a)(7), and this Court affirmed that decision. *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn., 1968), *aff'd per curiam*, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

(footnote continued on next page)

to vacate and motion for rehearing [A. 50], which was denied. Thereafter plaintiffs filed this appeal.

Summary of Argument

Protection of needy, dependent children is the paramount concern of the Aid to Families with Dependent Children program (AFDC). *King* v. *Smith*, 392 U.S. 309, 325 (1968). The Supreme Court in *King* held that states could not legally deny AFDC benefits to needy children on the basis of a conclusive presumption that a man having a sexual relationship with the children's mother, but not legally obligated to support those children, will provide the economic protection contemplated by the Social Security Act. *Id.* at 333. The Court also approved in *King* the long-standing nonassumption of income regulations of the Department of Health, Education and Welfare (HEW). *Id.* at 319 n. 16.

At least twelve states had man-in-the-house budgetary rules when *King* v. *Smith*, 392 U.S. 309 (1968) was decided. Pollack, Comment, *Man-in-the-house Rules After King* v. *Smith: New HEW Regulations*, 14 Welf. L. Bull. 19, 20 (Sept., 1968). Some of those rules were abandoned or overturned subsequent to the promulgation of the HEW regulation. *See, e.g., Grubb* v. *Kelly*, Civ. No. 69F3 (N.D. Ind., March 17, 1969), ¶ 9555 CCH Pov. L. Rep. (stipulation entered for amendment of Indiana stepfather regulations to conform with 45 C.F.R. § 203.1); *In re Byrdsoll*, ¶ 9193 CCH Pov. L. Rep. (Penn. Off. Pub. Assist.; regulations alleged inconsistent with 45 C.F.R. § 203.1 were deleted on Feb. 11, 1969 (16 Welf. L. Bull. 6, March 1969)); *Machado* v. *Hackney*, Civ. No. 68-108-SA (W.D. Tex., May 12, 1969) (Texas substitute father rule held invalid under *King* v. *Smith*, *supra*). In other jurisdictions litigation continues over man-in-the-house rules. *See, e.g., Abbs* v. *Graham*, Civ. No. 69-156 (D. Ariz., filed July 29, 1969), ¶ 10,273 CCH Pov. L. Rep.; *Mitchell* v. *Dept. of Pub. Welf.*, No. 655763 (Hennepin Co. Dist. Ct., Michigan), ¶ 9778 CCH Pov. L. Rep.; *Montes* v. *Wyman*, Civ. No. 69 Civ. 4773 (S.D.N.Y., filed Oct. 27, 1969), ¶ 10,677 CCH Pov. L. Rep. *See also Tartaglio* v. *Dept. of Inst. and Agen.*, 102 N.J. Super. 592, 246 A.2d 483 (N.J. Super. Ct., App. Div., 1968), *cert. den.*, 394 U.S. 1000 (1969).

In the wake of the *King* decision, HEW promulgated a regulation incorporating that holding and reaffirming the prohibition on assumption of income. The regulation, 45 C.F.R. § 203.1, states that, for purposes of determining a child's eligibility for federal AFDC assistance, the income of a man not ceremonially married to the mother of such children may not be treated as available to the family unless there is proof that he has made actual contributions. The regulation further prohibits a state from conclusively presuming the availability of income from a man who, although ceremonially married to the mother, is not the real or adoptive father of the children and is not legally obligated to support the children to the same extent as a real father, and who is not actually contributing such support. The HEW regulation does not violate the statutory command to "take into consideration any other income and resources of any child or relative claiming aid . . . ," 42 U.S.C. § 602(a)(7); it merely prohibits the assumption of income not actually available to the child. The regulation is valid because it reasonably interprets the terms of the statute and is consistent with the principles expounded by this Court in *King* v. *Smith, supra.*

California's welfare laws establish an irrebuttable presumption that a stepfather or "man assuming the role of spouse" (MARS) to the mother of needy children contributes all of his available income to them. Calif. W. & I.C. § 11351 imposes an apparent duty of support on a man in the house. Such a duty, existing only in welfare households, is not enforced in fact and is ill-suited to ensure meaningful economic protection for needy children. The man-in-the-house budgetary rules, nevertheless, mandate

he reduction, termination and denial of AFDC grants for eedy families with a stepfather or MARS, offering the urported support obligation in lieu of financial welfare ssistance. No amount of proof—no matter however posi- ve—is permitted to rebut the conclusive presumption that eedy children, whose mothers have a marital or sexual elationship with a man in the house, have available to hem and receive the use of the man's income.

California's man-in-the-house rules plainly conflict with he HEW regulation. The State of California has conceded his fact, and the court below so held. Because the regula- on comports with the Social Security Act and *King* v. *mith, supra,* the state rules are invalid. Moreover, the onclusive presumption denies needy children a fair oppor- unity to establish needs which clearly exist—despite the tate's contrary assumption—and, thereby, violates due rocess. Finally, the classification of otherwise identically ituated needy children, so as to deny federal AFDC bene- ts to the children of the disfavored class, whose mothers ave a sexual or marital relationship with a paramour or stepfather, has no reasonable nexus to the purposes of he AFDC program.

Congress did not create the Social Security Act in order o protect and extend economic security to arbitrarily se- ected dependent children while simultaneously offering ther children irrebuttable presumptions rather than food, lothing, shelter and medical attention. Neither did Con- ress seek to destroy family relationships. Yet that is the roduct of California's man-in-the-house laws. Because de- tructive of the purposes of the AFDC legislation and con- rary to constitutional requirements and to the Social

Security Act, as interpreted by this Court and implemented by HEW, such budgetary rules are accordingly invalid under the Act and under the Constitution of the United States.

ARGUMENT

I.

California's Man-in-the-House Laws Violate the Social Security Act and HEW Regulations, and Are Therefore Invalid.

A. The Social Security Act and HEW Regulations Promulgated Thereunder Preclude Welfare Grant Reductions Based on Assumptions of Availability of Income.

The Social Security Act implements a scheme of "cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968). Participating states receive substantial federal funds on a matching basis, and their plans must, therefore, conform with provisions of the Social Security Act and with rules and regulations promulgated by the Secretary of Health, Education and Welfare (HEW). *Id.* at 316.[12] One of the categorical public assistance programs created by the Act is Aid to Families with Dependent Children

[12] Under the Supremacy Clause, Art. VI, cl. 2, of the United States Constitution, federal legislation is controlling: "a State is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies." *United States* v. *Georgia Public Services Comm'n*, 371 U.S. 285, 293 (1963). A federal regulation implementing a valid congressional act is also controlling. *Free* v. *Bland*, 369 U.S. 663, 668 (1962).

(AFDC). 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 601 *et seq.*

The AFDC program, as interpreted by this Court in *King* v. *Smith*, *supra* at 325, has as its primary purpose and paramount concern the protection of needy children from economic insecurity. The language of § 401 of the Act, 49 Stat. 629 (1935), as amended, 42 U.S.C. § 601, states that the AFDC program seeks

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

Consistent with this paramount objective, the Secretary of HEW has the initial authority under the Act to interpret and implement the statutory provisions. 42 U.S.C. §§ 602(a)(6) and 1302.[13] Pursuant to 42 U.S.C. §§ 601 and 602, the Secretary must establish requirements for State plans seeking to receive federal matching funds for their AFDC programs. Congress specifically mandated the Secretary to require the State agency in determining need to "take into consideration any other income and resources of any child" seeking AFDC benefits. 42 U.S.C. § 602(a)

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[13] 42 U.S.C. § 1302 provides:

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

See also Note, *Welfare's "Condition X"*, 76 Yale L.J. 1222 (1967).

(7).[14] The Secretary of HEW has interpreted and im
mented § 602(a)(7) by a series of regulations setting f
the manner in which income and resources may be
sidered by the State agency while safeguarding the n
children from economic insecurity and promoting the
mary purpose of the Act. HEW *Handbook of Public*
sistance Administration (hereafter HEW *Handbook*),
IV, §§ 3120 *et seq.*; 45 C.F.R. § 203.1 (33 Fed. Reg. 1
August 8, 1968). The recurrent theme of these regulat
is that only income and resources actually received an
fact available are to be considered in determining need
the amount of welfare assistance to be paid a needy
vidual. HEW has expressly ordered states to "[e
from consideration . . . any income or resources *no*
assumed to be possessed by the individual." HEW *H*
book, Pt. IV, § 3120 (emphasis supplied). Example
income which must not be considered when it is not actu
and currently available to the needy individual inclu

> support payments ordered by the court but which
> not, in fact, made; contributions which relatives
> been determined able to make but which are no
> fact, made; and income from employment assume
> be available in the community when, in fact, the
> vidual is not working. [HEW *Handbook*, Pt.
> § 3120.]

Since July 1, 1967, HEW has explicitly *required* th

> the State plan must provide that *only* income and
> sources that are, in fact, available to an applican

[14] Section 602(a)(7) was amended by *Congress* in 1968. 81
881. The text of the section appears in Appendix A. *The dec*
of the court below rested on the language of § 602(a)(7) *pri*
the amendment [A. 35], although it made no significant chang
the law. *See infra*, p. 28.

> recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment. [HEW *Handbook*, Pt. IV, § 3131 (7).][11]"

The Supreme Court noted that the HEW regulations prohibiting the assumption of income to needy individuals "clearly comport" with the Social Security Act in *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

Following the express approval of its regulations by the Supreme Court, HEW promulgated 45 C.F.R. § 203.1 (hereafter the HEW regulation) refining its income availability regulations consistent with the Court's decision to invalidate substitute parent rules in *King* v. *Smith*. The new regulation provides in part:

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[11] Section 3131(7) was originally promulgated by HEW as Handbook Transmittal No. 86 (July 6, 1966). The covering letter with the transmittal noted that no new policies were being implemented. Subsequent to the appearance of Transmittal No. 86, a lawsuit was commenced challenging California's assumption of income policies. *McPherson* v. *California*, Civ. No. 46759 (N.D. Cal., June 29, 1967). Defendants in *McPherson* moved to dismiss the complaint because of the adoption by the State Department of Social Welfare of a new regulation (now Calif. *MPP*, § 44-101) that provided in part: "To be considered in determining the AFDC aid payment, income must, in fact, be currently available to needy members of the family . . . ." (The section as it presently exists appears in Appendix B, *infra*, p. 76.) The defendants conceded "[t]he reasonableness of plaintiffs' complaint on this issue [of income assumption]" in their Memorandum in Support of Motion to Vacate Order Convening Three Judge Court, set forth in part at L.R. 182. *See also* A. 51. On that basis, the three judge court ordered the action dismissed on June 29, 1967. In spite of their acceptance of § 3131(7) in *McPherson*, appellees have continued to apply rules, such as the man-in-the-house rules, that require assumption of income regardless of its actual nonavailability. *See* L.R. 127, 134-155. And appellees do so in the face of their own regulation to the contrary, Calif. *MPP* § 44-101.

(a) A State plan for aid and services to needy families with children . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

(b) The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. As provided in Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968), items 3.C.2(i) and (iii), and 6(ii), in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.[16]

[16] Subsection (b) of 45 C.F.R. § 203.1 incorporates by reference certain items from Interim Policy Statement No. 4 (33 F.R. 10230, July 17, 1968). The policy issuance required State plans for categorical aid programs, such as AFDC, to, *inter alia*:

ordingly, the established and long-standing policy of ress and the Department of Health, Education and are has been that income and resources are not to be ned available to needy persons in the absence of proof fact availability. In the case at bar, California's man-house rules are clearly contrary to the Social Security nd federal regulations because they require the wel-agency to assume that income of a man in the house ailable to needy children, whose mother resides with an, even though such income is, in fact, *not* available. ffect is that the needy children suffer grant reductions

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3.C.2. Provide that, in establishing financial eligibility and the amount of the assistance payment:

(i) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs;

• • •

(iii) *Only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered;*

• • •

6. If the State agency holds relatives responsible for the support of applicants and recipients,

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(ii) Provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21. [Emphasis supplied.]

EW noted that the purpose of the policy issuance was to up- and simplify Part IV of the HEW *Handbook*, §§ 3000 to 3200, to implement the 1967 Social Security Amendments, including 2(a)(7) [42 U.S.C. § 602(a)(7)]. 33 F.R. 10230 (July 17,).

although they do not receive any equivalent financial assistance or meaningful economic security from the man in the house. California contends, and the court below held [A. 39] that the HEW regulation is invalid, as inconsistent with the mandate of 42 U.S.C. § 602(a)(7). The AFDC families adversely affected by California's assumption of income rules submit that the Social Security Act and this Court's decision in *King* v. *Smith* make necessary and proper the HEW regulation in order to safeguard the rights of needy children.[17]

There is no dispute that, if valid, the HEW regulation precludes a man-in-the-house budgetary rule such as that existing under California law. Defendants have expressly conceded the plain conflict of the California man-in-the-house rules with the HEW regulation. L.R. 71, 79. The court below held that the state rules are clearly contrary to the HEW regulation [A. 35-39].

B. The HEW Regulation Is Valid as a Reasonable Implementation of the Social Security Act and the Decision of This Court in *King* v. *Smith*.

In determining the validity of a regulation of a federal administrative agency, such as HEW, the function of the court is to enquire only whether the regulation is "in conflict with express statutory provision" [18] and "unreasonable

[17] A three judge court of the United States District Court for the District of Connecticut has applied the HEW regulation to overturn Connecticut's version of a man-in-the-house budgetary rule. *Solman* v. *Shapiro*, 300 F.Supp. 409, 416 (1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969).

[18] *Maryland Casualty Co.* v. *United States*, 251 U.S. 342, 349 (1920).

and plainly inconsistent with" the statutory purpose,[19] and whether "weighty reasons" exist for overruling it.[20] Otherwise, a regulation promulgated under the rule-making authority of a federal administrative agency has "the force and effect of law."[21]

The HEW regulation in question has two principal facets. One (45 C.F.R. § 203.1(a))[22] defines the meaning of "parent" under the AFDC provisions of the Act; the other (45 C.F.R. § 203.1(b))[23] prohibits the states from as-

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[19] *Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931).

[20] *Commissioner* v. *Estate of Sternberger*, 348 U.S. 187, 199 (1955); *Billings* v. *Truesdell*, 321 U.S. 542, 552 (1944); *Brewster* v. *Gage*, 280 U.S. 327, 336 (1930).

[21] *Paul* v. *United States*, 371 U.S. 245, 255 (1963); *United States* v. *Mersky*, 361 U.S. 431, 437 (1960); *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 542 (1958); *Shaughnessy* v. *United States ex rel. Accardi*, 347 U.S. 260, 265 (1954), 349 U.S. 280, 285 (1955); *see also* Note, *Federal Judicial Review of State Welfare Practices*, 67 Colum. L. Rev. 84, 110-111 (1967).

[22] Section 203.1(a) provides in part:

> A State [AFDC] plan . . . must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to a child's stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

[23] Section 203.1(b) provides in part:

> The inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in paragraph (a) of this section is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . . [I]n

suming the availability of income from a person other than a parent as defined by the regulation. The former provision is a codification by HEW of this Court's holding in *King* v. *Smith*, 392 U.S. 309 (1968).[24] The latter refines the long-standing HEW policy on nonassumption of income consistent with the interpretation given the Act by the *King* decision.[25] Notwithstanding the contention of defendants

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> the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.

[24] Alanson Willcox, General Counsel of HEW, has explained [A. 58 n. 3] the HEW regulation in part as follows:

> The reasoning of the opinion [in *King* v. *Smith*] clearly supports the further restriction that the State law imposing such an obligation must be of general applicability and impose the same obligation as is borne by the natural parents. To permit a special lesser duty to be established for stepfathers or other substitute fathers of children on public assistance (or children who are poor) would be an obvious circumvention of the law as interpreted by the Supreme Court.

[25] Prior to *King*, HEW had done little to enforce its prohibition on assumption of income rules against state man-in-the-house laws. Such arguably implicit approval does nothing, of course, to legitimize those laws when contrary to the controlling statute. *King* v. *Smith*, 392 U.S. 309, 333 n. 34 (1968). The reason for HEW's prior inaction was offered by its General Counsel [A. 57-58] as follows:

> Prior to the decision of the U.S. Supreme Court in *King* v. *Smith*, the [nonassumption of income] regulations were applied in the light of State "substitute father" rules. Some States with such rules made children totally ineligible because of a stepfather or other substitute father, while other States with such rules assumed the income of the substitute father and allowed the family to be eligible for needs beyond that income. Such assumption of income was tolerated by the Federal agency, even though otherwise contrary to the Federal regulation, only because it was viewed as the application of a sub-

and the holding of the court below,[35] the HEW regulation unquestionably is consistent with the congressional mandate of the Social Security Act.

1. The HEW Regulation Is Not in Conflict With Any Express Statutory Provision of the Act.

Section 402(a)(7) of the Social Security Act, 53 Stat. 1379 (1939), as amended, 42 U.S.C. § 602(a)(7), declares that the State agency "shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." The Social Security Act is silent on the question of whether income may be *assumed* to be available to a needy child from one who is not a natural or adoptive parent, or the spouse of such parent. Indeed, there is no clear in-

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stitute father rule, albeit one which did not automatically make the family completely ineligible for AFDC.

When the decision in *King* invalidated State substitute father rules, there was no basis for the Federal agency to apply its regulations relating to non-assumption of income in any way other than as written. It should be particularly noted that the Supreme Court was mindful of these regulations and stated that they "clearly comport with the statute." 88 S. Ct. 2128, 2134, n. 16 (1968).

[35] The Court below declared [A. 39]:

Plaintiffs contend that the HEW regulation must prevail over the California practice because the regulations were adopted pursuant to an act of Congress. We disagree, for we find the California practice, and not the HEW regulations, to be in accord with the Social Security Act. As mentioned above, the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

dication in the statutory language that Congress intended to authorize imputation of income to needy children under any circumstances. Section 602(a)(7) appears reasonably on its face to refer only to the consideration of income *actually* available to the needy child. The long-standing interpretation by HEW to that effect has been held by the Supreme Court to "clearly comport" with the Act. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).

The phrase "child or relative claiming aid" in § 602(a)(7) cannot be said to conflict with HEW's requirement that a State may consider only income in fact available from a man in the house. For that language clearly requires the "relative" to *claim* aid.[17] The men from whom income was considered available to the needy children in this case did not seek AFDC aid, nor were they entitled to such benefits under California welfare law.[18]

The 1968 amendment to § 602(a)(7) added language which California urged as a blanket authorization for states to assume income in a man-in-the-house situation.[19] L.R. 80;

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[17] The three judge court in *Solman* v. *Shapiro*, 300 F.Supp. 409, 415 (D. Conn., 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L. Wk. 3125 (No. 215, Oct. 14, 1969), noted that a stepfather residing with needy children is not a "relative claiming aid."

[18] Calif. *MPP* §§ 44-213.21 and 213.31 provide that persons excluded from an AFDC budget unit are "[a]n unrelated male over the age of 18 living in the home who is not married to the mother and has no children in common with her" and "[t]he stepfather, the mother, and the stepfather's children of another relationship living in the home, when his *separate* income meets their needs" [emphasis in original]. Indeed, under California law a person "other than a needy child, who willfully and knowingly receives or uses any part of an [AFDC] aid grant . . . for a purpose other than support of the needy children and the caretaker involved, is guilty of a misdemeanor." Calif. W. & I.C. § 11480.

[19] The court below, however, relied only upon the statutory language prior to the 1968 amendment [A. 35].

P.R. 133. As amended, 81 Stat. 881, the section provides in relevant part (amendment underscored):

> [The state welfare agency] shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . .

In *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L.Wk. 3125 (No. 215, Oct. 14, 1969), the State of Connecticut and its welfare agency had similarly relied upon the 1968 amendment to justify the Connecticut man-in-the-house rule. The three judge court in *Solman* disagreed with their contention. 300 F.Supp. at 414. The court noted that the new language had "a special meaning" and that its purpose was to codify the HEW "essential person" rule which permits a state "to establish the need of the individual on a basis that recognizes as essential to him the presence in the home of other needy persons. . . . " HEW *Handbook*, Pt. IV, § 3131(4).[20]

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[20] Under the essential person doctrine a needy person has the right to elect to include in the family budget unit persons who are not otherwise eligible when their presence in the home is essential to the recipient. An example of an "essential person" is the wife of a man who is eligible for old-age assistance. Obviously, the wife's continued presence in the home is essential to the recipient's well-being. Her needs could therefore be included in the grant and her income and resources considered.

The state cannot insist that a nonrecipient be deemed an essential person. HEW *Handbook*, Pt. IV, § 3131(4). *See Solman* v. *Shapiro*, *supra* at 415. Thus, even if the language added to § 602 (a)(7) permits assumption of income from an essential person, such an assumption is improper when the recipient has not elected

Solman v. *Shapiro, supra* at 414. HEW has also stated that the added language in § 602(a)(7) related only to its essential person doctrine.[31] And this view of the meaning of the 1968 amendment is consistent with its legislative history. According to the Report of the Committee on Ways and Means, in which the amendment originated, the new language in 42 U.S.C. § 602(a)(7) "makes no change in present law." H.R. Rep. No. 544, 90th Cong., 1st Sess. 174 (1967).

Scrutiny of § 602(a)(7), even as amended by Congress in 1968, provides no basis upon which to hold the HEW regulation involved in the case at bar in conflict with the *express* statutory language of the Social Security Act.

2. The HEW Regulation Comports With the Purposes of the Social Security Act and the Decision of This Court in *King* v. *Smith*.

The HEW regulation was promulgated under the broad rule-making powers of the Secretary[32] in order to imple-

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to claim the person to be essential. The recipients in *Solman* had not designated the stepfather to be essential. *Id.* The California welfare agency does not recognize a MARS as an essential person, and a stepfather may qualify only under limited circumstances. *See* n. 28, *supra*, p. 26. And, as in *Solman*, none of the plaintiffs in the case at bar have claimed the man in the house as an essential person.

[31] A. 54-55 (Letter of Alanson Willcox, General Counsel of HEW).

[32] *See* n. 12, *supra* p. 16. This Court has earlier recognized the expansive powers delegated to the Secretary of HEW under the Social Security Act. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277 n. 28 (1969) (dictum). Other federal courts have so found. *See, e.g., Worrell* v. *Sterrett*, Civ. No. 69F33 (N.D. Ind., Oct. 15, 1969), ¶ 10,575 CCH Pov. L. Rep.

ment 42 U.S.C. §§ 602 and 1302. 33 Fed. Reg. 11290 (August 8, 1968). Appellants submit that the HEW regulation is a reasonable implementation of the purposes of the Social Security Act.

(a) *The HEW Regulation Ensures the Economic Security of Needy Children.*

The paramount concern of Congress in enacting the Aid to Families with Dependent Children (AFDC) program was the protection of needy, dependent children. *King* v. *Smith*, 392 U.S. 309, 325 (1968). In *King*, the Supreme Court reviewed one version of a man-in-the-house rule, Alabama's "substitute father" law, which denied AFDC assistance to needy children whose mother maintained a relationship with an unrelated male. *Id.* at 314. The Alabama law assumed that a man having a sexual relationship with the mother of needy children was a "parent" in the sense of the Act, so that children having such a "substitute father" were not deemed to be deprived of parental support. *Id.* at 327.

Expressing its disapproval of a state plan under which "the actual financial situation of the family is irrelevant," *id.* at 320, the Court ruled that the Social Security Act precludes the disqualification of needy children from AFDC on the arbitrary basis of a conclusive presumption that a man not legally obligated to support the family was in fact doing so. The facts in *King* did not require the Court to consider "budgetary" man-in-the-house rules, such as those challenged herein, which purport to govern need determinations as opposed to eligibility. However, as was the case of the rules held invalid in *King*, the California rules ignore "the actual financial situation of the family"

in favor of the conclusive presumption that a man residing in a welfare household will contribute his available income to the needy children. The California man-in-the-house rules permit no inquiry to determine how much income is *in fact* available to the children. No regard is paid to the fact that the supposed support duty, which exists only in welfare families, is defeasible by the man's mere removal from the home. Nor does the welfare department seek to enforce the obligation. Rather, the rules operate to decrease and deny welfare grants on the conclusive presumption that needy children can secure basic subsistence needs with theoretical rights in lieu of federal categorical assistance. The principles enunciated by this Court support the validity of the HEW regulation that would preclude California's version of a man-in-the-house rule.

The Court noted that the Alabama law was inconsistent with congressional intent because it did not "provide adequate economic protection for a dependent child," *King* v. *Smith*, 392 U.S. 309, 332 (1968), or "provide meaningful economic security for [the] child," *id.*, at 330, thus leaving "one class of destitute children entirely without meaningful protection," *id.* at 330. The HEW regulation attempts to ensure that needy children will have "meaningful economic security" by prohibiting the states from denying AFDC benefits to children who have no "natural or adoptive parent" or "stepparent who is ceremonially married to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." 45 C.F.R. § 203.1 (a). Such a limitation on who may be deemed a parent

guarantees that the child will have meaningful protection. Natural or adoptive parents are traditionally held responsible to support their children. *See, e.g.*, Calif. Civ. C. §§ 241 *et seq.* Moreover, that support obligation is meaningful because it is enforced by both criminal[33] and civil[34] sanctions. The HEW regulation also recognizes that a stepparent under a support obligation equivalent to that imposed upon natural or adoptive parents may be deemed a parent without denying needy children the meaningful economic protection envisioned by Congress.

The HEW regulation does not permit the state to assume that a man, who merely resides with the family and has a sexual relationship with the mother, or a stepfather, who is not under a generally applicable support duty equivalent to that imposed upon natural or adoptive parents, is a parent. Common-law relationships between adults do not in general experience afford needy children sufficient economic security to warrant a conclusive presumption that they are supported either wholly or in part by the man in the house.[35] The unstable nature of a man-in-

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[33] Calif. Pen. C. § 270.

[34] Calif. Civ. C. §§ 241 *et seq.* (Uniform Civil Liability for Support Act). Child support orders are enforcible by remedies including the following: contempt proceedings (Calif. C.C.P. § 1209); execution against property (C.C.P. § 688); and garnishment (C.C.P. § 543). Also available are court procedures to secure support from a parent residing in another state. Calif. C.C.P. §§ 1650 *et seq.* (Uniform Reciprocal Enforcement of Support Act).

[35] The foremost commentators on the relative merits of Calif. W. & I.C. § 11351, Professor tenBroek and Professors Lewis and Levy, are—in spite of their numerous differences—in accord on one aspect of the California statute: it is *not* reasonable to infer that a man assuming the role of spouse will contribute to the support of the mother and her needy child, the opinion of the California

the-house relationship, especially in light of the financial burdens on the family, underscores its inadequacy as a guarantee of meaningful economic security for needy children.[36] Moreover, California law imposes the obligation on a stepfather *only* during the time that he resides with the needy children.[37]

In *Solman* v. *Shapiro*, 300 F.Supp. 409 (D. Conn. 1968), *aff'd per curiam*, —— U.S. ——, 38 U.S.L.Wk. 3125 (No. 215, Oct. 14, 1969), a three judge district court held invalid a Connecticut statute requiring the consideration of the stepparent's available income and ability to support a needy child in determining that child's need for AFDC

Supreme Court in *People* v. *Shirley*, 55 Cal.2d 521, 529, 360 P.2d 33, 38, 11 Cal. Rptr. 537, 542 (1961), notwithstanding. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (Pt. III), 17 Stan. L. Rev. 614, 658 n. 999 (1965); Lewis and Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"*, 54 Calif. L. Rev. 748, 779 (1966).

[36] Section 11351 formerly provided: "Where a needy child lives with his mother and a stepfather or an adult male person assuming the role of spouse . . . ." The statewide regulations implementing the law deem the respective relationships to exist only as long as the stepfather resides with his wife and her needy children (Calif. *MPP* § 42-513.54) or the MARS is "in or around the home and is maintaining an intimate relationship with the mother" (Calif. *MPP* § 42-515.411) *and* he either assumes financial responsibility for the needy family *or* holds himself out to the community as husband or father or both (Calif. *MPP* §§ 42-515.412 and 515.413). *See* Appendices E and F.

The new MARS law, § 11351.5, retains the same standard: "Whenever an unrelated adult male *resides* with a family applying for or receiving [AFDC] . . ., he shall be required to make a financial contribution to the family . . ." (emphasis supplied). *See* Appendices G and H.

[37] The stepfather, once he leaves the welfare home, is no longer obligated to support his stepchildren under Calif. Civ. C. § 209. *See infra* p. 33.

benefits. The court in *Solman* noted that the state law was not one "of general applicability imposing an obligation on a stepfather to support his minor stepchildren," as required by *King* v. *Smith*, 392 U.S. 309, 329 (1968), and that it therefore "squarely contravenes the [HEW] regulation." *Solman* v. *Shapiro, supra* at 414. The generally applicable support law in Connecticut imposes no support duty on stepfathers, and none is recognized in Connecticut's common law. *Id.* California similarly has no generally applicable support law obligating stepfathers and men "assuming the role of spouse" to support the children in their household. In fact, Calif. Civ. C., § 209, explicitly denies that such a duty exists unless the stepfather stands in loco parentis to the stepchild. Section 209 provides in part that "[a] husband is not bound to maintain his wife's children by a former husband; but if he receives them into his family and supports them, it is presumed that he does so as a parent. . . . " California does, however, impose a limited support duty on a man residing with an AFDC family, without regard to whether the man in the house supports the needy children or "receives them into his family." [38] Calif. W. & I.C. §§ 11351 and 11351.5.

The effect of the California man-in-the-house law is to reduce and deny AFDC assistance to needy children in spite of the fact that no meaningful economic protection is actually afforded by the mere existence of a conclusive presumption.[39] Thus, in the case of the Lewis family, the

[38] *See* ns. 36 and 37, *supra*.

[39] Indeed, the California practice is to decrease welfare grants for needy children with a man in the house regardless of the fact that his income is not actually available, or to prosecute for grand theft and welfare fraud those mothers who are "overpaid" under the budgetary rules of § 11351 because they fail to report the presence

children received approximately $55 less AFDC assistance because the man in the house was presumed to be contributing that amount [A. 7]. The welfare department admitted that the reduction was made in spite of the absence in fact of such contribution from the man in the house. L.R. 125. And the welfare department stipulated that the HEW regulation would preclude such a grant reduction. L.R. 128. It is precisely this form of a budgetary man-in-the-house rule that HEW sought to eliminate subsequent to *King* v. *Smith*,

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of a stepfather or MARS. *See, e.g., People* v. *Shirley*, 55 Cal.2d 521, 360 P.2d 33, 11 Cal. Rptr. 537 (1961); *People* v. *Flores*, 197 Cal. App.2d 611, 17 Cal. Rptr. 382 (1961); *People* v. *Ford*, 236 Cal. App.2d 438, 46 Cal. Rptr. 144, *appeal dismissed*, 384 U.S. 100 (1965). When such an "overpayment" is made, the welfare department further reduces—or even cuts off entirely—welfare grants in order to collect the "overpayment." Calif. *MPP* §§ 44-333 and 335; *see Stallworth* v. *California*, Civ. No. 48393 (N.D. Cal., voluntarily dismissed on Nov. 12, 1969, subsequent to promulgation of new regulations). California's method of enforcing § 11351 can hardly be held to benefit needy children who need food and clothing, not irrebuttable presumptions.

And California county welfare departments have virtually never sought enforcement of the man-in-the-house obligation through criminal or civil prosecutions. (However, an unemployed MARS may be prosecuted for misuse of welfare funds under Calif. W. & I.C. § 11480. *See* n. 28, *supra*, p. 26.) In a preliminary study conducted by the Yale Law Journal in March, 1969, the ten California counties with the largest welfare populations indicated it was *not* their practice to enforce § 11351 against the MARS and for the benefit of the needy children by use of court action. Several of the respondents volunteered that enforcement of the obligation was achieved through welfare fraud prosecutions. Rosen, *Enforcement of California's Man Assuming the Role of Spouse Statute: Empirical Findings* (May, 1969) (printed in Sparer, *Materials on Public Assistance Law*, Univ. of Penn. L. Sch., Reginald Heber Smith Community Lawyer Fellowship Program (unpublished, Summer, 1969), v. 1, pp. 5-132 to 5-143). Further survey efforts secured responses from district attorneys and welfare departments in over forty counties and established that nonenforcement of the § 11351 support obligation against a man in the house was virtually universal. (Survey responses are on file in the office of the Yale Law Journal and in the Yale Law School Library.)

392 U.S. 309 (1968), correctly perceiving that a failure to prohibit income assumption rules in man-in-the-house cases would circumvent the *King* decision.[40]

Subsection (b) of the HEW regulation specifically implements such a nonassumption standard, a principle embraced by this Court in expressly approving HEW rules which prohibit the assumption of income from relatives who have a legal duty of support or who may, indeed, be under a court order to supply such support. *King* v. *Smith*, 392 U.S. 309, 319 n. 16 (1968).[41] In fact the Court spoke approvingly of the predecessor of the HEW regulation here involved, indicating that income presumptions are disfavored. *Id.* The Supreme Court observed that regular and actual contributions are, of course, properly considered in determining need. However, in interpreting the words "other income and resources" the Court reached a conclusion very different from that arrived at by the court below in the case at bar.

> Indeed, the Act requires that in determining need the state agency "shall . . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." 42 U.S.C. § 602(a)(7). Regulations of HEW, which

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[40] *See* n. 24, *supra*, p. 24.

[41] HEW explains the application of the nonassumption rule to situations when there is a legal obligation or a court has ordered support payments, as follows:

> [I]n reviewing actual practice, it has been found that most support payments in AFDC are irregular. . . . Reduced assistance payments based on assumed receipt of support payments or any other income that is not, in fact, available, are inconsistent with the welfare agency's responsibility for meeting need and strengthening family life. They result in inequity in meeting the continuing needs of the family affected. [HEW *Handbook*, Pt. IV, § 3124.]

> clearly comport with the statute, restrict the resources which are to be taken into account under § 602 to those "that are, in fact, available to an applicant or recipient for current use on a regular basis. . . . This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual. Handbook, Pt. IV, § 3131(7). See also §§ 3120, 3123, 3124, 3131(10), and 3131(11)." [392 U.S. at 319 n. 16]

By emphasizing that only actual and regular contributions assure needy children of meaningful economic protection, the Court implicitly acknowledged that the paramount purpose of Congress—to give economic security to such children—would not be afforded by a state's reliance upon an ephemeral legal duty of support, when the only practical effect and importance of that duty is to justify an irrebuttable presumption of availability of income. It is axiomatic that a man does not become a father—or as this Court said in *King* v. *Smith*, a "breadwinner"—simply because of the state's conclusive presumption that he is one. In light of *King*, HEW has properly acted to preclude any form of substitute father or man-in-the-house rules which fail to conform with the paramount purpose of the AFDC program.

(b) *The HEW Regulation Implements the Statutory Requirement of the Affirmative Pursuit of Resources Through Court Proceedings.*

Congress recently expressed its intention that local welfare agencies, when faced with situations in which persons

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[42] The regulations cited are set forth in Appendix C.

legally obligated to support children fail to do so, should employ state court procedures to secure such support. For example, under 42 U.S.C. § 602(a)(17), 81 Stat. 878 (1968), the State agency must assist an AFDC child who is born out of wedlock in establishing paternity and securing support, and the agency must assist an AFDC child who has been deserted or abandoned by his parent in securing support from such parent and in utilizing interstate arrangements to obtain or enforce court orders for support.[48] *See also* 42 U.S.C. §§ 602(a)(16), (18), (21) and (22), 81 Stat. 878-9, 896-7 (1968). The legislative history of these amendments underscores the congressional emphasis on an increased utilization of law enforcement resources. S. Rep. No. 744, 90th Cong., 1st Sess. 160-63 (1967).

In *King* v. *Smith*, 392 U.S. 309, 332 (1968), this Court concluded from the clear pattern of the AFDC legislation that Congress intended that the State agency would "secure parental support *in lieu of* AFDC support for dependent children" (emphasis supplied). Of course, "[s]uch parental support can be secured only where the parent is under a state-imposed legal duty to support the child"; if there is no such duty, needy children are left entirely without the meaningful economic protection intended by Congress. *Id.* The Court further noted that "parent" as used by Congress must encompass only those persons who are legally obligated to support a dependent child. *Id.* at 327. Otherwise, the statutory requirement that absent parents be reported to law enforcement officials would be

[48] California offers no such assistance to a welfare family with a nonsupporting man in the house. The State will, however, prosecute both the man and the welfare mother for misuse of welfare funds to meet the man's needs in accordance with Calif. W. & I.C. § 11480. *See* n. 28, *supra*, p. 26.

a nullity. The "very purpose of such referrals is to institute nonsupport proceedings." *Id.* at 331.

The HEW regulation ensures that an assumption that income is available from a man in the house will not be made the basis for welfare grant reductions when the man's relationship to the needy family does not in the common experience offer the child meaningful economic protection. Thus, the man must be ceremonially married to the mother of the needy children and under a generally applicable duty of support. 45 C.F.R. § 203.1(a). HEW thereby recognizes that only enforcement of a support duty —not an assumption that it is discharged—can be an equivalent substitute for AFDC assistance.[44] Because the HEW regulation further implements the principle of the affirmative pursuit of resources through court proceedings, the approach favored by Congress and approved by *King* v. *Smith*, it clearly comports with the purposes of the Social Security Act.

(c) *The HEW Regulation Reinforces the Statutory Mandate to Maintain and Strengthen Family Life.*

Section 401 of the Social Security Act, 42 U.S.C. § 601, declares the intent of Congress in passing the AFDC program

> to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

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[44] California's practice, as has been pointed out, is contra. *See* n. 39, *supra*, p. 33.

Indeed, Congress has recently directed states to implement AFDC programs so as to "maintain and strengthen family life." 42 U.S.C. §602(a)(14), (15), 81 Stat. 878 (1968). Rules and practices interfering with such objectives would, of course, be invalid. *King* v. *Smith*, 392 U.S. 309 (1968).[46]

The HEW regulation acts to prohibit man-in-the-house rules which, in fact, accelerate family dissolution and promote dependency and broken homes. In operation, man-in-the-house budgetary rules reduce the financial resources of the needy family. Theoretically available income may never be received, nor can its contribution be readily compelled. Nevertheless, needy children are told to meet their subsistence needs with reduced welfare grants.[46]

The common result of the application of such rules is the break-up of the family unit.[47] For example, in the cases of intervenors Bell and Sims, the stepfathers left their families because they were unable to meet even the basic needs of the family on the reduced grant offered by the welfare department. P.R. 56, 71. In the words of the court below [A. 45], the California laws

> induce some men to depart from the home so that the family may continue to receive welfare payments without reduction for amounts determined by the state to be contributed by the MARS. Men who respond

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[46] *See* n. 12, *supra*, p. 16.

[46] *See supra*, pp. 33-35.

[47] Professor tenBroek noted in *California's Dual System of Family Law: Its Origin, Development, and Present Status* (Pt. III), 17 Stan. L. Rev. 614, 658 n. 999 (1965), that the California man-in-the-house rules have a "deterrent effect on stable common-law unions providing a two-parent home for the [needy] child."

> to this inducement undoubtedly deprive themselves of the resources of family life and may also create a less advantageous situation for the children because of their absence.

To prevent such further deprivation of needy children, the HEW regulation prohibits the assumption of income unless the children have meaningful protection, such as is offered by a natural or adoptive father, or a stepfather under an equivalent support obligation.[48] In the face of facts showing that the enforcement of man-in-the-house budgetary rules conflicts with basic purposes of the Social Security Act, the HEW regulation can hardly be deemed to be contrary to the statutory design.

3. No Weighty Reasons Justify Overruling the HEW Regulation.

The court below reasoned [A. 39] that the HEW regulation violates 42 U.S.C. § 602(a)(7) because

> . . . the Act requires the states, in determining need, to consider "any other income and resources of any child." 42 U.S.C. § 602(a)(7). The Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to con-

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[48] The question is not (as seen by the court below) whether California "has acted arbitrarily or wholly irrationally in choosing to risk the continued existence of such tenuous families rather than encourage irresponsible males to shirk the responsibilities which society has chosen to impose on family breadwinners" [A. 46], but rather whether state AFDC plans, such as that of California, which necessarily have this effect, are consistent with the congressional directive to "maintain and strengthen family life" under 42 U.S.C. § 601, as interpreted by HEW.

sider only resources whose receipt by the child has been proved.

However, that approach was erroneous. The question before the court below was not whether the California rule is *a priori* the "better" implementation of the statute; the question is whether the HEW regulation is valid. Section 602(a)(7) does not, on its face, preclude the HEW regulation. Indeed, the words "other income and resources" in § 602(a)(7) are "not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation." *Textile Mills Securities Corp.* v. *Commissioner*, 314 U.S. 326, 338 (1941).

While it may be true that "each State is free to set its own standard of need," *King* v. *Smith*, 392 U.S. 309, 318 (1968), Congress has specifically delegated to the Secretary of HEW the authority to implement the particular aspect of how "other income and resources" are to be considered under 42 U.S.C. § 602(a)(7). Congress has similarly authorized the Secretary to consider other aspects of state need determinations, such as earned income deductions (42 U.S.C. §§ 602(a)(7) and (8)) and cost-of-living increases (42 U.S.C. § 602(a)(23)). In giving broad powers to HEW to implement the purposes of the Social Security Act, Congress could not have intended totally to foreclose inquiry by HEW into a vital aspect of the operation of a federally-created and largely federally-financed program.[49]

[49] The court below felt that the wording of the HEW regulation —that "income . . . [be] actually available for current use on a regular basis" [45 C.F.R. § 203.1(b)]—interferes with the state's power to determine need according to state standards. But that viewpoint ignores the teaching of this Court in *King* v. *Smith*, 392 U.S. 309 (1968). It was there stated that "there is no question that *regular and actual contributions* . . . can be taken into account

Accordingly, in exercising its broad powers, HEW remains free to interpret and, if necessary, to reinforce the purposes of the Social Security Act in order to extend economic security to dependent children and to safeguard the legal rights of individuals.[50] In particular, HEW is en-

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in determining whether the child is needy," *id.* at 319 (emphasis supplied), and additionally that the state's "interest in economically allocating its limited AFDC resources may be protected by its undisputed power to set the level of benefits and the standard of need, *and* by its taking into account in determining whether a child is needy all *actual and regular contributions* to his support," *id.* at 334 (emphasis supplied). The *King* decision cannot fairly be read to support the claim that states may, in the guise of determining need, violate with impunity the fundamental purposes of the Social Security Act. *King* does hold that, notwithstanding the state's fiscal interests, a needy child may never be disqualified from AFDC assistance on the basis of an assumption that he is actually being supported by a supposed "breadwinner"—especially when that person is not actually contributing and there is not even a legal duty to support the child. *Id.* at 329.

Congress doubtless sought to establish a need determination process that would be efficient and reflective of local economic conditions. However, a delegation of *primary* authority to the states to set need standards cannot be made the basis for the seizure of exclusive control. And, assuming arguendo that the states did have exclusive authority to determine need, Congress must have intended to reserve to HEW powers to establish the outer bounds of the states' authority. Otherwise, a federal-state program would soon be swallowed by one half of the cooperative arrangement.

[50] In addition to having a range of reasonable motivations designed to implement the objectives of the Act, such as the long-standing nonassumption of income rules, HEW undoubtedly also acted so as to abide by constitutional standards in promulgating the regulation in question. For example, it is difficult to ascertain whether, in fact, the equivalent of a common-law marriage exists without seriously invading the rights of privacy of those involved. HEW doubtless considered a decision of the California Supreme Court in which welfare department practices designed to implement the very laws drawn in question in the instant case were held to violate rights of privacy and the Fourth Amendment. *Parrish* v. *Civil Service Comm'n*, 66 Cal.2d 260, 425 P.2d 223 (1967). HEW may also have considered that man-in-the-house rules are applicable to AFDC families only, and that the transfer of society's burden to

titled to insist upon the existence of proof of meaningful economic protection before it sanctions the denial of federal financial assistance to needy children. Because there are no weighty reasons to overturn the federal regulation, and because HEW has reasonably interpreted the objectives of Congress in its regulation implementing 42 U.S.C. § 602(a)(7), the regulation is valid.

II.

California's Man-in-the-House Laws Unconstitutionally Deny Needy, Dependent Children Due Process and Equal Protection of Law.

A child who is deprived of parental support, as defined by the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, qualifies for AFDC benefits, if he is needy according to standards established by state law. *King* v. *Smith*, 392 U.S. 309, 334 (1968). In determining whether a child is needy, the state must consider "any other income and resources of the child or relative claiming aid." 42 U.S.C. § 602(a)(7). Arbitrary eligibility conditions, which make a child's actual need irrelevant, are invalid. *King* v. *Smith*, *supra*. Unfair and unreasonable practices are subject to fundamental due process requirements regardless of whether welfare assistance is classified as a right or a privilege. *See Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969). Distinctions between classes of eligible children must be reasonable in light of the purposes of the AFDC program. *See Levy* v.

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a particular unrelated male may violate equal protection guarantees. *Cf. Department of Mental Hygiene* v. *Kirchner*, 60 Cal.2d 716, 388 P.2d 720 (1964), *vacated and remanded*, 380 U.S. 194, *on remand*, 62 Cal.2d 586, 400 P.2d 321 (1965).

Louisiana, 391 U.S. 68, 71 (1968); *Shapiro* v. *Thompson*, *supra* at 627-633.

The State of California has availed itself of the AFDC legislation and funding established by Congress. Calif. W. & I.C. §§ 11200 *et seq.* The method for determining need under California welfare law purports to be a calculus of a dependent child's need. The welfare department first determines according to tabulated budget standards what amount of income a particular family must have in order to meet minimum basic needs.[51] From this need figure are deducted all amounts of nonexempt income, such as child support payments or other regularly recurring income that are *actually received.* A recipient's employment income is applied to meet his needs after deductions are made for work-related expenses—limited to certain items, such as child care and union dues—and work incentive allowances pursuant to 42 U.S.C. § 602(a)(7) and (8). The amount of needs not met by the individual's income will be the amount of his welfare grant, unless it exceeds the maximum benefit level established by the state legislature. Calif. W. & I.C. § 11450(a).[52] If needs exceed the maximum benefit level, the amount of the grant will be the statutory maximum.

In determining how much AFDC assistance it will extend to a needy child, California takes into consideration the income deemed available from a man in the house, according to the conclusive presumption that such a man, who maintains a relationship with the child's mother, is contributing to the child's support. The man's income may

[51] *See* n. 3, *supra*, p. 6.

[52] *See* n. 4, *supra*, p. 7.

not be available in fact; he may fail to provide the amount of support presumed, or, indeed, any support. The welfare department nevertheless reduces or terminates the child's AFDC welfare grant without regard to the facts. California's rule does not condition eligibility on the absence of all men from the home. Appellant welfare recipients do not contend that California's man-in-the-house laws are a mirror image of the Alabama substitute father rule held invalid in *King* v. *Smith*, 392 U.S. 309 (1968). (Alabama established an eligibility rule that denied AFDC benefits to a child—no matter how needy in fact—whose mother maintained a sexual relationship with a man. Alabama claimed the man to be a "substitute father", such that the child was not deprived of parental support.) But, although California does not automatically deny aid to a needy child whose mother has a relationship with a man, it does make the child ineligible for that amount of aid assumed to be available from the man in the house without regard to whether such money is, in fact, available and received.

Needy children existing under such circumstances accordingly have less total income than other children whose basic needs are identical. The disfavored class of needy children have no opportunity to present proof—no matter how weighty—to rebut the income presumption arising from their mother's relationship to a man, whether stepfather or man assuming the role of spouse (MARS).

A. Calif. W. & I.C. § 11351 Violates Due Process by Substituting an Arbitrary Conclusive Presumption for an Opportunity to Prove the Actual Need of Dependent Children for Federal Welfare Assistance.

Calif. W. & I.C. § 11351 and implementing regulations impose an obligation on a stepfather who resides with an

AFDC family to support the needy children of his spouse to the full extent of his available income. Having created the obligation, § 11351 conclusively presumes that it will be voluntarily fulfilled. On the basis of that presumption, the welfare family's grant is reduced in the amount of the income deemed available from the man in the house. Thus, the budgetary rule established by Calif. W. & I.C. § 11351 expresses an evidentiary presumption, conclusive in nature, that the statutory support obligation is discharged.[53] *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 539 (1961); *People* v. *Owens*, 231 Cal. App. 2d 691, 697, 42 Cal. Rptr. 153, 157 (1965).

Such presumptions are legally disfavored, being permissible only when the facts presumed are true beyond a reasonable doubt and the presumption is "incapable of being overcome by proof of the most positive character." *Heiner* v. *Donnan*, 285 U.S. 312, 324 (1932). Applied in situations where a reasonable doubt exists, they deprive persons of

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[53] It might be claimed that § 11351 is a substantive rule of law which the legislature chose to express as a rule of evidence. (The California Supreme Court suggested this possibility by stating that overturning California's man-in-the-house laws "would place a premium upon an illegal relationship and operate as a deterrent to marriage of the mother and the man assuming the role of spouse." *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 540 (1961).) The outcome of this case does not turn on the ultimate nature of the rule. It is invalid whatever its form and purpose. If § 11351 is found to be a substantive rule of law, its operative effect is the punishment of needy children because of their mother's illicit conduct, and the break-up of family groups. State interests in discouraging immorality through their AFDC programs "are not presently legitimate justifications for AFDC disqualification." *King* v. *Smith*, 392 U.S. 309, 320 (1968). If the statute is a conclusive evidentiary presumption, as the text herein assumes, it denies due process by foreclosing the needy child's opportunity to present the actual facts concerning his income and resources.

property without due process of law.[54] "This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment." *Heiner* v. *Donnan, supra* at 329.

California's man-in-the-house budgetary rules present a paradigm of the evils of the irrebuttable—and wholly arbitrary—presumption. That the facts presumed by California are not true beyond a reasonable doubt is an understatement. They are inherently incredible.

The arbitrary nature of the presumption is evident in the method for calculating available income. The budgetary rules recognize only limited deductions for the man's personal needs and obligations.[55] Although he is not himself a welfare recipient, the man's basic needs are reduced to the bare subsistence levels of welfare grants. Such standards have recently been held to be legally inadequate.[56] The housing allowances have been described as "mere fictions."[57] Only limited work expenses are allowed, and

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[54] Under California law, federal categorical aid payments are a statutory entitlement. *Social Welfare Board* v. *County of Los Angeles*, 27 Cal.2d 81, 85, 162 P.2d 630, 633 (1945). *See also Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969). And unreasonable conclusive presumptions in public assistance programs have been held invalid on prior occasions. *See, e.g., Robertson* v. *Born*, Civ. No. 51364 (N.D. Cal., June 12, 1969), ¶ 10,254 CCH Pov. L. Rep.

[55] Those deductions include the following items: work-related expenses; support payments actually made to dependents living elsewhere; alimony payments pursuant to court order; medical expenses; basic living expenses according to welfare standards. Calif. *MPP* §§ 44-113.23 and 113.24. *See* Appendices E and F.

[56] *See* n. 3, *supra*, p. 6.

[57] *See* n. 6, *supra*, p. 8.

those at welfare standards.[58] The amount of income deemed available under California's man-in-the-house rules is often substantially less than what is, in fact, available.[59] Thus, a man in a welfare household confronts equally unpalatable alternatives. He may attempt to discharge the obligation imposed by § 11351. To do so will likely force him to default on his debts and lose his credit standing; he must eschew charities, activities, entertainments or other pleasures he might otherwise enjoy; he must give up or lose by repossession his car, his television, and anything else being purchased on installment credit, which the California rules do not permit him to afford. Although not a welfare recipient, he must live at a welfare subsistence level. If he fails to live within those niggardly terms, his "available income" may disappear. The children will continue to receive a reduced grant, regardless of how well—or poorly—the man sustains his burden.

In the alternative, the stepfather may use his income to meet his actual, bona fide expenses and, thereby, relegate his wife's children to meeting their basic needs out of reduced welfare grants. The needy children have, of course, the comfort of the man's unfulfilled duty and their supposed right to enforce that duty.[60] But persons, who are

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[58] For example, Calif. *MPP* § 44-114.211 provides that the allowance for automobile travel is four cents per mile.

[59] In the case of the MARS who resided with the Percys, his income was approximately $370 per month. His obligations and expenses amounted to $400. Nevertheless, the welfare department found that his available income was sufficient to make the Percys ineligible for any AFDC benefits. The Percys' needs were $192, according to state welfare standards [A. 17-18].

[60] Appellees suggest that the support duty under § 11351 gives the needy children economic security. L.R. 85. But they have failed to cite any cases showing that such security exists for the children.

(*footnote continued on next page*)

by definition impoverished, cannot often afford to pursue whatever rights they may have. Free legal services—especially for domestic matters—are not yet everywhere available. Even assuming that legal remedies are available, the likely result would be the termination of the support obligation by the departure from the household of the stepfather, who would be practically unable to bear the burdens of his marriage.

A very different situation exists as to enforcement of the support obligation of a needy child's absent father. A natural father who fails to support his children is subjected to criminal liability. Calif. Pen. C. § 270. The welfare department must automatically refer any AFDC case in which the parent has failed to support to the district attorney. Calif. W. & I.C. § 11476. The welfare mother must aid in the prosecution on pain of forfeiting her children's AFDC benefits. Calif. W. & I.C. § 11477.[61] No comparable provisions ensure enforcement of a welfare stepfather's obligation.[62] The welfare mother is not even

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Their invocation of a "legal right" that has no substance for those who are purported to be protected by that right is reminiscent of the argument in defense of racial discrimination that black people also have a "legal right" to discriminate. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 21-22 (1948).

[61] *See* Calif. *MPP* §§ 42-513.2 and 513.3, set forth in Appendix F.

[62] California criminally enforces the natural father's support obligation because welfare grants can be reduced only in proportion to his *actual contributions*. Calif. *MPP* § 42-519.3 provides: "Only the contributions actually made by the absent parent on behalf of the children shall be considered in determining eligibility or the amount of aid." *See* Appendix F. A cynic might posit that California's reason for not providing for criminal enforcement of the MARS and stepfather obligations is simple: since welfare grants are *automatically* reduced according to a conclusive presumption that the obligations are met, California welfare officials have no need to ensure that the obligations are in fact discharged.

informed of the possibility of criminal prosecution of the stepfather—if such is a possibility[63]—much less required to consult and aid the district attorney so as to secure non-welfare income for their children. The ephemeral obligation arising under § 11351 hardly offers meaningful economic security to needy children whose welfare grants are calculated to meet their *present* minimum actual needs. A conclusive presumption that available income is contributed in lieu of receipt in fact of actual income does not feed and clothe presently needy children. Yet the existence of such a presumption is the sole basis for grant denials and reductions.[64]

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[63] There is no statutory equivalent to Calif. Pen. C. § 270 that provides criminal sanctions against a welfare stepfather or MARS who fails to support. Some California courts have strenuously avoided suggesting that such a support duty even exists. Thus,

> [§ 11351] does not deprive the adult male of his property. It merely states . . . that if an adult male assumes the role of a spouse his income shall be taken into consideration in determining the amount of the grant . . . . It takes nothing from him. It merely requires that his income be considered.

People v. *Rozell*, 212 Cal.App.2d 875, 878, 28 Cal. Rptr. 478, 480-481 (1963) (emphasis supplied); *People* v. *Ford*, 236 Cal.App.2d 438, 441, 46 Cal. Rptr. 144, 146-147 (1965). *See also County of Kern* v. *Coley*, 229 Cal.App.2d 172, 177, 40 Cal. Rptr. 53, 56 (1964) ("While she may have no legal right to any part of his income, such may be considered in determining the aid granted"). And a recent case suggests that even a ceremonially married stepfather may have no legal duty to support. *People* v. *Owens*, 231 Cal.App.2d 691, 697, 42 Cal. Rptr. 153, 157 (1965). For purposes of this appeal, appellants assume arguendo that a duty exists; their concern is that it is wholly unsubstantial as a means of offering needy children economic security in lieu of AFDC assistance. *See* n. 39, *supra*, pp. 33-34.

[64] The opinion below [A. 46-47] aptly characterizes the operation of § 11351.

> [Regardless of whether the stepfather or MARS makes his earnings available to the family, such income is] deemed by the state to be net income available to the family. . . . To the

The California Supreme Court has suggested that the conclusive presumption of § 11351 was designed to avoid the administrative inconveniences associated with determining how much income is, in fact, contributed by a stepfather to the needy children of his spouse. *People* v. *Shirley*, 55 Cal.2d 521, 525, 360 P.2d 33, 35, 11 Cal. Rptr. 537, 539 (1961). But the conclusive presumptions invalidated in *Heiner* v. *Donnan*, 285 U.S. 312 (1932), and *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926), also purported to alleviate administrative difficulties involved in determining certain facts. The facts presumed in those cases were that gifts given within six and two years (respectively) of the donor's death were given in expectation thereof. Even though such facts related to intent, a matter especially difficult of proof, this Court still deemed the imposition of a conclusive presumption to be a denial of due process. California seeks to justify a conclusive presumption of reduced need, a fact which is certainly more capable of proof than the intent of a dead man, merely because of the presence in the home of a stepfather. Even if difficulties of proof would justify an otherwise impermissible conclusive presumption, California seems to be overdoing it. It is one thing to conclusively presume facts which are probably true, but very difficult of proof. It is quite another to conclusively presume facts

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extent of such net income, therefore, the state reduces the amount of assistance to the AFDC family. The state does not abstain from making the deduction though the MARS [or stepfather] fails to apply his net income to the family. Plaintiffs contend that this, the State's refusal to consider that [the stepfather's or] MARS' income is not being applied to the needs of the AFDC family is a denial of due process.

Plaintiffs' argument has an initial attraction. One rebels at the notion that the State may assume facts that do not exist and then reduce benefits on the basis of those nonexistent facts.

which are difficult of proof because they are probably untrue.[65]

A further proposed justification for the conclusive presumption of decreased needs in man-in-the-house cases is the legitimate concern of the state to minimize costs. But such an interest can hardly be made the basis for denying *any* opportunity to deprived children to prove the actual extent of their needs. *See Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969).[66]

California's man-in-the-house laws impose an obligation so onerous that few, if any, men will voluntarily comply with it. The supposed obligation is unenforced by the welfare department in practice. It is, moreover, practically

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[65] Indeed, the facts presumed are so unlikely that the presumption would probably fail to meet the permissible standard for a rebuttable presumption: "[that] it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend," *Leary* v. *United States,* 395 U.S. 6, 36 (1969). *See also United States* v. *Romano,* 382 U.S. 136 (1965); *Tot* v. *United States,* 319 U.S. 463 (1943).

[66] The Court in *Shapiro* v. *Thompson,* 394 U.S. 618, 637 (1968), declared that state residence requirements, although claimed by the states to guard against double payment of welfare benefits, were an unreasonable "blunderbuss method of denying assistance to all indigent newcomers for an entire year."

Also disposed of was the states' contention that they had a legitimate interest in discouraging those indigents who immigrate solely to secure larger welfare benefits. The Court held that the residence laws invoked by the states were all-inclusive,

> lumping the great majority who come to the State for other purposes with those who come for the sole purpose of collecting higher benefits. . . . [The state laws] enact what in effect are nonrebuttable presumptions that every applicant for assistance in his first year of residence came to the jurisdiction solely to obtain higher benefits. Nothing whatever in any of these records supplies any basis in fact for such a presumption. [*Id.* at 631.]

unenforceable by welfare mothers and children. The effect of the conclusive presumption that the duty is discharged is that welfare grants, providing for the minimal needs of children, are reduced or terminated although no support is in fact available or received. Thus a law which ostensibly provides a special support obligation for the benefit of welfare children in reality only saves the state money at the children's expense. Dependent children are given a meaningless, abstract right and an empty presumption rather than AFDC welfare assistance, regardless of their actual need. Appellants submit that needy children may not be constitutionally deprived of federal welfare assistance, without which they face miserable privation, because of a wholly arbitrary conclusive presumption that they receive equivalent economic security from a man in the house. The Fifth and Fourteenth Amendments to the United States Constitution cannot countenance such a manifestly unfair result.

B. Calif. W. & I.C. § 11351 Arbitrarily Classifies Identically Situated Classes of Needy Children Without Reasonable Relation to the Purposes of the AFDC Welfare Program.

The class of needy children represented by appellants in the case at bar includes children who are deprived of parental support in the sense of the Social Security Act. To the degree that they are needy according to standards established by the State of California, the children are eligible for federal welfare assistance under the Aid to Families with Dependent Children (AFDC) program. 42 U.S.C. §§ 601 *et seq.* All members of the class reside in households in which their mothers maintain marital or

sexual relationships with men who are not the natural or adoptive fathers of the needy children.[67] California has not conditioned AFDC eligibility on the absence of such men from the home, such as Alabama had wrongfully done in *King* v. *Smith,* 392 U.S. 309 (1968). Rather, California has subjected the class of needy children to grant reductions, complete terminations or application denials because of the man-in-the-house rules created by Calif. W. & I.C. § 11351. Those rules conclusively presume that the man provides support to the needy children, thereby reducing their need for AFDC financial assistance. That the needy children within the class do not, in fact, have the income of the man in the house available to meet their basic subsistence needs is ignored by California's rules.[68] The fact that the needy children have the same basic needs as all other children similarly situated is also irrelevant under the man-in-the-house laws. Such disparate treatment arises solely because of their mother's relationship with a man who is a stepfather to the children or assuming the role of spouse to the mother. The disfavored class of needy children suffers decreased welfare assistance because of circumstances which are beyond their control and, moreover, wholly irrelevant to their *actual* need.

The plain facts of the case at bar, as stated in the complaints and recognized by the court below [A. 38-39], are

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[67] The man-in-the-house budgetary rules are invoked when the man marries the mother of the needy children and becomes their stepfather, or assumes the role of spouse to the mother. The latter status obtains when the man has an "intimate" relationship with the mother and is in or around the home and either assuming financial burdens for the family or holding himself out in the community as spouse or parent. Calif. *MPP* §§ 42-515.412 and 515.413. *See* Appendix F.

[68] *See supra,* pp. 6-7.

that neither appellants nor the class they represent receive the sums that the welfare department irrebuttably presumes them to receive, or anything even approximating those sums. The Lewis children suffered a grant reduction of $55 because of California's man-in-the-house rule yet received no equivalent support from the MARS [A. 7-8; L.R. 4]. Mrs. Percy and her daughter were denied any part of the $148 monthly welfare grant they were entitled to because they lived with a MARS. But that man's income was not in fact available to the Percys [A. 17-18]. The Jacobs children were denied the monthly grant of $237 they were entitled to receive because their mother had remarried and their stepfather's income was assumed available to meet their needs. Their verified complaint stated that, due to his pressing personal needs and debts, the only financial assistance extended by the stepfather was of a temporary nature to meet the emergency confronting the children. And the complaint further claimed that continued application of the conclusive presumption to deprive the Jacobs children of AFDC benefits would force the stepfather to leave the home. P.R. 56. The verified complaint of the Bell family showed that the stepfather in that household had, indeed, been forced to move out because of the overwhelming financial crisis worked by the man-in-the-house rules [A. 26-27].

The validity of a discriminatory classification, such as exists under Calif. W. & I.C. § 11351, depends upon the reasonableness of the scheme in light of the purposes of the AFDC program. *See Levy* v. *Louisiana,* 391 U.S. 68, 71 (1968). The state "may not draw a line which constitutes an invidious discrimination against a particular class." *Id. See also Skinner* v. *Oklahoma,* 316 U.S. 535, 541-542 (1942). The line drawn must be a rational one. *Levy* v. *Louisiana,*

supra at 71. Moreover, when the classification interferes with fundamental rights, it must withstand even stricter scrutiny. *See Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969), and cases there cited. Only compelling state interests can justify the denial of basic, federally-created rights. *Id. See Levy* v. *Louisiana, supra* at 71-72.

In *Levy,* the Court held that illegitimate children could not constitutionally be denied the right to maintain an action for the wrongful death of their mother.

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . [I]n her death they [her illegitimate children] suffered wrong in the sense that any dependent would. [391 U.S. at 72.]

Similarly California may not consistent with equal protection principles discriminate against needy, dependent children solely on the basis of their mother's relationship to a man in the house. The presence in their household of a stepfather or man assuming the role of spouse (MARS) to their mother cannot be made the basis for a *conclusive* presumption that the children have less need for AFDC assistance than other needy children. If the children remain needy in spite of the man's presence, their needs cannot arbitrarily be ignored.

The operative effect of California's man-in-the-house laws clearly jeopardizes the economic security of needy children and the stability of their home. But the very purpose of the AFDC program is to extend meaningful economic security to needy, dependent children, *King* v. *Smith,* 392 U.S. 309, 325 (1968), and to maintain a stable home life for such children. Congress intended to provide needy

children with food, shelter, clothing and other necessities —not with irrebuttable presumptions. A state, utilizing federal funds to implement an AFDC program, may not act so as to inhibit the fulfillment of the central purposes of the Social Security Act. *Cf. Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). As the three judge court noted in *Smith* v. *King,* 277 F.Supp. 31, 38 (M.D. Ala., 1967), *aff'd on other grounds,* 392 U.S. 309 (1968), a state that has adopted an AFDC program

> is not now free to bestow the benefits of the program upon some needy children and arbitrarily to deny them to others. There cannot be any picking and choosing of the mothers and children who will be aided if it is done in an irrational or in an arbitrary manner.

While a state may properly seek to minimize the expense of administering governmental functions,[9] mere economy is not a "compelling interest" such as to justify denying basic subsistence grants to needy children. *Shapiro* v. *Thompson,* 394 U.S. 618, 633 (1969). In holding welfare residence laws unconstitutional, this Court has stated "[t]he saving of welfare costs cannot justify an otherwise invidious classification." *Id.* at 633. *See also Rinaldi* v. *Yeager,* 384 U.S. 305, 309-310 (1966). There are available to the State other, less onerous alternatives to promote the fiscal soundness of the AFDC program. For example, the State might seek to collect the amount of support determined due from a man in the house in order to secure reimburse-

[9] The court below observed that grant reductions and denials in man-in-the-house cases may make it possible to increase welfare grants for "other recipients whose needs are not met by the present level of assistance without increasing the level of appropriations" [A. 44].

ment of welfare assistance paid to the children. This is precisely the method used when a natural father fails to support.[70] The obvious result of affirmative pursuit of a nonsupporting man in the house would be to give the needy children actual financial aid when it is needed. Such an inquiry would also reveal what was in fact contributed by the man in the house. California, nevertheless, prefers to reduce expenses by means of an arbitrary conclusive presumption that the needs are met. The State then has no financial interest in seeing that the support obligation is discharged.[71] That approach can hardy be deemed *neces-*

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[70] *See* n. 62, *supra*, p. 49, and related text. Moreover, Congress has indicated its preference, when the welfare of needy children is at stake, for judicial fact-finding and court orders rather than arbitrary conclusive presumptions. 42 U.S.C. §§ 602(a)(16), (17), (18), (21), (22), 81 Stat. 878-9, 896-7. *See also King* v. *Smith*, 392 U.S. 309, 331-333 (1968).

[71] The court below perceived that § 11351 promotes California's fiscal interest by putting the support burden on the man in the house.

> [W]e repeat that payments from an able MARS are compelled by law. If the state assumed the availability of resources whose application to the needs of the family were not required by law, that would present a different case. Here the MARS is under a legal obligation to support the children. . . . We are reluctant to prohibit the state from operating on the assumption that the law has been complied with. Nor are we in a position to deny to the state a logical method for encouraging compliance with the law. As one authority has observed, the practice of budgetary modification was adopted not so much to measure contributions actually being made as to see to it that contributions were made. [A. 47; citations and footnotes omitted.]

The court failed, however, to consider why California prefers affirmatively to enforce support obligations against natural fathers while merely assuming that a man in the house complies with his duty. If the State is required to grant full AFDC benefits unless child support payments are actually made, there is, of course, a greater interest in enforcing the support obligation in order to recoup the amounts paid as welfare assistance. *See* n. 62, *supra*, p. 49.

sary to the accomplishment of a valid state interest. *Cf. McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Thus, California has erected a classification scheme that disfavors needy children—in spite of their actual need—because their mother maintains a relationship with a man in the house. Such a scheme cannot be held to comport with the purposes of the AFDC program. In fact, the discrimination is counterproductive to the objectives of the federal legislation. Under even traditional equal protection standards, the California scheme is invalid. To hold otherwise would require the assumption that Congress "intended arbitrarily to leave one class of destitute children entirely without meaningful protection." *King* v. *Smith*, 392 U.S. 309, 330 (1968). Moreover, the scheme invoked by California is hardly *necessary* to promote the State's interest in economy. And, when weighed against federally-created rights of needy children to meaningful economic security, whatever the interests served by California's man-in-the-house rules, they are not so compelling as to justify the denial of basic subsistence to an arbitrarily selected class of needy children.[12] California's rules, therefore, abridge equal protection guarantees and are invalid.

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[12] As this Court noted in *Shapiro* v. *Thompson*, 394 U.S. 618, 627 (1968), welfare aid may determine whether needy families can obtain "the very means to subsist—food, shelter, and other necessities of life." In *Rothstein* v. *Wyman*, 303 F.Supp. 339, 346-47 (S.D.N.Y., 1969), the District Court stated:

> Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote the general Welfare." Implicit in those phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state,

Conclusion

Appellants seek the relief of this Court against California's continued application of man-in-the-house rules, which deny basic subsistence to needy children. Further litigation to resolve the issues raised in the case at bar will irreparably injure the needy families and result in malnutrition, unhealthful living conditions and disruption of family life. Such litigation is unnecessary because all parties concede, and the court below held, that the HEW regulation, 45 C.F.R. § 203.1, if valid, indisputably precludes the operation of California's man-in-the-house rules under Calif. W. & I.C. § 11351.

Accordingly, appellants respectfully request that this Court, for the reasons set forth above, reverse the decision of the Court below; declare the HEW regulation held invalid below to be a reasonable and lawful implementation by the Secretary of HEW of the Social Security Act, 42 U.S.C. § 602(a)(7); declare Calif. W. & I.C. § 11351 and implementing regulations to be invalid under the Social Security Act and HEW regulations, including 45 C.F.R.

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is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. . . . It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business on Sunday or to extract gas from subsoil. We believe that with the stakes so high in terms of human misery the equal protection standard to be applied should be stricter than that used upon review of commercial legislation and more nearly approximate that applied to laws affecting constitutional rights. [Footnotes and citations omitted.]

§ 203.1; enjoin the continued enforcement of Calif. W. & I. C. § 11351 and implementing regulations; declare Calif. W. & I.C. § 11351 and implementing regulations to be unconstitutional as violative of due process and equal protection guarantees; award appellants benefits wrongfully denied them by the operation of the invalid laws; and remand for further proceedings in the District Court the question of the validity of the recently enacted statute, Calif. W. & I.C. § 11351.5.

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